

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HI-LITE STRIPING CO., INC.

CASE NO. 93-60014

Debtor

Chapter 11

APPEARANCES:

ANTONUCCI & FINTEL, ESQS.
Attorney for Debtor
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Watertown, New York 13601

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Of Counsel

WILLIAMS & WILLIAMS, ESQS.
Attorneys for Pavemark and
Walter Finley
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MARK V. WILLIAMS, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Before the Court is the motion of David P. Antonucci, Esq. ("Antonucci") as counsel to Hi-Lite Striping Co., Inc. ("Debtor") seeking payment of counsel fees from Pavemark Corporation ("Pavemark") and Walter Finley ("Finley"). The motion first appeared on the Court's calendar at Utica, New York on January 30, 1996 and was adjourned to February 26, 1996, for argument. On February 26, 1996, the Court reserved decision on the motion.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b) and 157(a), (b)(1) and (b)(2)(A).

FACTS

On September 15, 1994, this Court entered a Memorandum-Decision, Findings of Fact and Conclusions of Law and Order ("September 15th Order"), on a motion filed by the Debtor seeking to hold Pavemark and one of its principals, Finley, in contempt of court for wilfully violating §362(a) of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code").

In its September 15th Order, the Court, while conceptually awarding attorney fees to Antonucci, concluded that there was insufficient proof in the record to quantify the award and directed as follows:

"The Court will, however, permit Debtor's counsel to file and serve on Pavemark/Finley's attorneys, within ten days of the date of this Order, an application for costs and attorney's fees incurred in connection with this contested matter." Id. at 9.

Antonucci did not thereafter file an application for costs and attorney's fees within ten days of the date of the September 15th Order. Antonucci did, however, file on October 12, 1994, an Interim Application For Allowance For Services Rendered by Counsel ("Interim Application") seeking compensation for the period December 28, 1992 through August 22, 1994, and requesting a fee of \$24,418.50 and disbursements of \$2,337.77.¹ The Interim Application references all services rendered to the Debtor in connection with the Chapter 11 case and includes services rendered

¹ The Court subsequently approved the Interim Application in the amount of \$23,568.50 in fees and \$1,813.77 in expenses by Order dated March 29, 1996.

in connection with the contempt motion.²

In the contested matter presently before the Court, Antonucci seeks to compel payment of attorney fees and costs from Pavemark and Finley pursuant to the September 15th Order.

DISCUSSION

Pavemark and Finley oppose the motion on the ground that Antonucci failed to comply with the Court's September 15th Order. They further contend that Antonucci's Interim Application, which apparently included fees for services rendered in connection with the contempt motion, constitutes a waiver of his rights pursuant to the September 15th Order.

Antonucci responds that he believed that his fees and costs would be paid by Pavemark and Finley without the necessity of a formal application since they had paid that portion of the September 15th Order which awarded actual damages of \$2,225.00 to the Debtor "without the necessity of judgment." (See Affidavit of David Antonucci sworn to February 26, 1996 at ¶6). Antonucci references correspondence between himself and the attorneys for Pavemark and Finley, outlining efforts to settle on the amount of attorney fees. Attached to Antonucci's Affidavit is a copy of one letter dated October 24, 1994, addressed to counsel for Pavemark and Finley, advising "Attorneys fees are in the approximate amount of \$2500.00." Also attached are copies of subsequent letters in

² The Court is unaware as to whether or not Antonucci has been paid the amount sought in the Interim Application.

February and June of 1995 written by Antonucci requesting payment of the attorneys fees presumably pursuant to the September 15th Order. Antonucci alleges that he provided the attorneys for Pavemark and Finley with a copy of the Interim Application "with the relevant sections highlighted and discussed settlement". (See Antonucci Affidavit sworn to February 26, 1996 at ¶7).

Finally, Antonucci argues that to have filed two separate fee applications would have been a waste of estate assets. The Interim Application, he opines, complied with both the letter and the spirit of the September 15th Order.

Unfortunately, the Court is not persuaded by Antonucci's contentions and unless it were to conclude that the Interim Application served the dual purpose of complying with the September 15th Order, as well as seeking a fee award for all other services rendered to the Debtor in the Chapter 11 case, it must determine that Antonucci has waived his right to attorneys fees and costs from Pavemark and Finley.

Clearly, if the September 15th Order had required Antonucci or the Debtor to take an action that would have conferred a benefit on Finley or Pavemark and either or both failed or refused, Pavemark and Finley would have been entitled to sanctions. The Court is unable to discern any difference when the action required to be taken by Antonucci pursuant to the September 15th Order coincidentally was to ultimately inure to Antonucci's benefit. Non-compliance is nevertheless non-compliance. As the First Circuit Court of Appeals recently observed in Gemco Latino America Inc. v. Seiko Time Corp., 61 F.3d 94, 99 (1st Cir. 1995) in

commenting on a party's violation of an attachment order, "But self help in the teeth of the court's order was not permissible".

The issue herein is not what Antonucci thought might be the most cost conscious approach to compliance with the September 15th Order, the issue is whether he complied with the Order and, if not, what the consequences should be.

Upon review of all of the proof presented, the Court concludes that Antonucci did not comply with the Court's September 15th Order and, therefore, he has waived his right to seek its enforcement at this juncture. His motion to compel payment of attorneys fees from Pavemark and/or Finley is denied.³

IT IS SO ORDERED.

Dated at Utica, New York
this 7th day of June 1996

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

³ The Court does not consider herein the effect of this Decision on the obligation of the Debtor to pay that portion of Antonucci's fees relating to the Pavemark/Finley contested matter and apparently included the Interim Application approved by Order of this Court dated March 29, 1996.